

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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:
HEINS RODRIGUEZ, :
: 16-CV-5861 (NG) (RER)
Plaintiff, :
: April 24, 2018
:
v. : Brooklyn, New York
:
CITY OF NEW YORK, et al., :
:
Defendant. :
-----X

TRANSCRIPT OF CIVIL CAUSE FOR MOTION CONFERENCE
BEFORE THE HONORABLE RAMON E. REYES, JR
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: GABRIEL HARVIS, ESQ.
BAREE FETT, ESQ.

For the Defendant: ZACHARY BERGMAN, ESQ.
ARTHUR LARKIN, ESQ.

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1 THE CLERK: Civil cause for motion hearing,
2 docket number 16-CV-5861, Rodriguez v. City of New
3 York.

4 Counsel for plaintiff, please state your
5 name for the record.

6 MR. HARVIS: Gabriel Harvis of Harvis & Fett
7 for the plaintiff Heins Rodriguez. Good morning, your
8 Honor.

9 MS. FETT: Good morning, your Honor. Baree
10 Fett for plaintiff Heins Rodriguez.

11 THE COURT: Good morning.

12 THE CLERK: Counsel for the defendants,
13 please state your name for the record.

14 Mr. BERGMAN: Good morning, your Honor.
15 Zachary Bergman for the City and the individually named
16 defendants.

17 MR. LARKIN: Good morning, your Honor.
18 Arthur Larkin, City Law Department, also for the
19 defendants.

20 THE COURT: Good morning.

21 Mr. Harvis, this is your application, so go
22 ahead.

23 MR. HARVIS: Thank you, your Honor. Our
24 position is that -- everything is in our letter. We
25 had requested material back in March of 2017. We

1 consider the material to be core discovery, much of
2 which is subject to mandatory disclosure pursuant to
3 Rule 26(a). The City has no legitimate objection to
4 the production and they haven't even articulated a
5 position in opposition on the merits. They've simply
6 taken the position that plaintiff has violated an
7 imaginary order limiting his ability to get discovery
8 and that the's failed to show good cause. We don't
9 believe that that argument has any basis in law and we
10 believe that the defendants should be compelled to
11 produce the material. We don't think this is a very
12 controversial application.

13 THE COURT: Why didn't you raise this issue
14 prior to April 11th?

15 MR. HARVIS: Well, we were working with the
16 defendants over the course of approximately nine months
17 to try to get the material. We had served a number of
18 emails to them. We attached them as exhibits to our
19 motion. We repeatedly informed Ms. Bardauskis that we
20 were going to be seeking court intervention and she
21 asked us not to, told us that she would be producing
22 things. Then it finally got to a point where we
23 believed it was responsible to involve the Court
24 because we had not received core documents and they
25 were needed in order to take depositions. We were also

1 well within the discovery deadline when we did that.

2 But in terms of why it wasn't specifically
3 raised at the last conference?

4 THE COURT: Yeah. Well, that's part of it.

5 MR. HARVIS: There was no -- to be fair, I
6 don't believe that there was any question posed to
7 counsel about if there were open disputes. Defense
8 counsel certainly knew that we had raised these matters
9 by email and that there were open issues. My reading
10 of the transcript was that the Court basically said we
11 had until May 18th to get the case ready.

12 THE COURT: There's a colloquy with Ms. Fett
13 right at the front of the conference, when I say,
14 "Okay, you're done with discovery, right?" Then Ms.
15 Fett says, "No, we're not, we're close," and then she
16 talks about -- all she talks about is depositions.
17 There was no discussion of outstanding documents.

18 MR. HARVIS: Sure, I appreciate that. I can
19 speak to that, your Honor, unless you -- would you like
20 to?

21 MS. FETT: You can go ahead.

22 MR. HARVIS: I was just going to say that
23 the defendants are the defendants are the ones who were
24 aware of the fact that this material was overdue.
25 We're acting I think squarely within the rules by first

1 serving a Rule 33 and 34 demand, following up by email,
2 and in good faith attempting to obtain them directly
3 from the City. And then only when it became impossible
4 to complete the case without the material did we give
5 them a final opportunity to produce it. They still
6 refused to provide a date certain when they would
7 provide it. As we mentioned, this is stuff that is
8 subject to mandatory disclosure in large measure. So
9 then we, well within the deadline, filed the motion.
10 So in terms of why --

11 THE COURT: Well within an extended
12 deadline, when the discussion was held prior to the
13 original deadline, either prior to or right after the
14 original deadline expiring.

15 MR. HARVIS: We concede that but I think the
16 Court knows, the main reason why these deadlines have
17 been adjusted are reasons that are completely outside
18 of the control of the plaintiff. Plaintiff at every
19 turn has been nothing but accommodating with a series
20 of courtesies when these events have befallen the
21 defense attorneys. For us to then be told that that
22 somehow acts to limit our ability to pursue relevant
23 discovery seems frankly unfair because all we know is,
24 this is a discovery deadline. You have to serve your
25 demands more than thirty days before that deadline. If

1 you're going to move for something, you'd sure better
2 do it before the deadline expires.

3 Here we had -- first, we told them about it
4 on April 4th, when there was like six weeks left. They
5 didn't even get back to us for a week. Then when we
6 finally met, they said they don't dispute that we're
7 entitled to it but they can't give us a date, so we
8 wrote the Court. I don't see anywhere in the
9 transcript where your Honor said we couldn't pursue
10 discovery or there was any limitation on what we could
11 pursue. Since what we're talking about is such
12 squarely relevant material, we just didn't understand
13 there to be any limitation at all on our pursuit of
14 that material.

15 If I may, your Honor, I have one more thing
16 I'd like to add.

17 THE COURT: Hold on just one second.

18 MR. HARVIS: Of course.

19 (Pause in proceedings.)

20 THE COURT: All right.

21 MR. HARVIS: I do think it makes sense to
22 talk about orders and whether or not orders in this
23 case have been obeyed, because the orders that were
24 actually made at that March 22nd conference, and we
25 quoted that portion, were that the defendants, given

1 the prior proceedings, needed to expeditiously make
2 sure that this case was properly transferred. As we
3 know, and there's just no question about it, that did
4 not happen.

5 What happened was, it was initially
6 transferred to someone who was unprepared to deal with
7 the litigation, which has not been expanded in the
8 least, so that was a violation of the Court's order.
9 Then a second violation happened when the Court ordered
10 the parties to meet and confer in good faith on Friday,
11 and that process was frustrated by the fact that a new
12 attorney was assigned yesterday and that person
13 obviously knew nothing about the case and again could
14 not meaningfully participate in the meet and confer
15 because they didn't know the file and they just simply
16 stated over and over as we tried to go through the
17 issues that they stood on their objections, even though
18 for example, with respect to the disciplinary files,
19 their objections would have not only no basis in law,
20 but they're directly contrary to your Honor's own
21 ruling in the Frails case, which is on all fours with
22 the facts here.

23 It's an egregious excessive force incident.
24 We're seeking the files that are relevant to that kind
25 of a case. We don't find it controversial. So we

1 believe that the issue of violating court orders is
2 really on one side of the table.

3 THE COURT: Even if I were to agree with you
4 that there is some document discovery that, although it
5 wasn't specifically discussed at the March 22nd
6 conference, remains outstanding because in the letter
7 asking for an extension, a joint letter asking for an
8 extension, you referred to -- or Ms. Fett it was I
9 guess who wrote the letter. The parties require
10 additional time to conduct depositions and to complete
11 any remaining document discovery. So I agree with you
12 there. You've asked for additional depositions of
13 nonparties that were not discussed either at the
14 conference or previously.

15 MR. HARVIS: I appreciate that, your Honor,
16 and I would say -- first of all, I just want to -- I
17 don't mean to disagree with the Court at all but I
18 would say that we haven't asked for them because I
19 don't believe that we need to ask for them, because I
20 believe that under the rules, we are presumptively
21 entitled to take ten depositions. We haven't even
22 suggested the taking of ten depositions. We've
23 suggested less. Our application that was presented to
24 your Honor on April 11th does not seek leave of the
25 Court to take depositions because no order was entered

1 limiting our ability to take depositions. With the
2 benefit of hindsight, of course I would have liked to
3 have been able to say to the Court at the last
4 conference, there are three other people that we may
5 also want to depose, three or four, but I believe that
6 it's not only --

7 THE COURT: I thought it was eight.

8 MR. HARVIS: Well, the total is eight but we
9 mentioned four at the last conference, so it's an
10 additional four. But I would submit to your Honor that
11 when an attorney is handling a case and the discovery
12 period remains open, and there's been no order cabining
13 the parties' ability to take discovery, that
14 professional responsibility demands --

15 THE COURT: Well, there was an order
16 cabining the time period in which to do it.

17 MR. HARVIS: Of course. So long as we -- if
18 we were unable to meet that deadline, then we have a
19 problem and we have to seek leave. But that's why, in
20 a responsible manner, more than six weeks out from the
21 expiration of the deadline, we made, in the most
22 detailed manner possession, the outstanding material
23 known to the defendants. We gave them a reasonable --

24 THE COURT: Wait a second, wait a second. I
25 extended the discovery on March 22nd.

1 MR. HARVIS: Yes.

2 THE COURT: At that point, there were
3 depositions that the parties had discussed taking that
4 were still outstanding.

5 MR. HARVIS: Yes.

6 THE COURT: There were documents -- any
7 remaining document discovery that was asked for was
8 promised, just not by a date certain. At that point, I
9 extended it. I didn't know about these other
10 depositions that you wanted to take.

11 MR. HARVIS: Right.

12 THE COURT: So then you noticed them after
13 the fact, when the order itself -- I'll put up the
14 transcript if I have it -- while not artfully phrased
15 -- where is it?

16 MR. BERGMAN: Page 9, your Honor.

17 THE COURT: Thank you.

18 MR. BERGMAN: Top of page 9.

19 THE COURT: Thank you. "I will give you
20 until May 18th to complete all discovery, depositions,
21 post-deposition document requests, whatever." I guess
22 whatever is the catchall but it was never -- even if
23 whatever were to include any remaining document
24 discovery which was mentioned in the joint letter
25 asking for an extension and even if whatever would

1 include -- whatever doesn't include depositions.
2 Depositions must specifically reference but the only
3 depositions that I was told about were the ones that we
4 discussed of the officers, the defendants and the
5 plaintiff, not these other ones.

6 MR. HARVIS: I'm glad your Honor brought
7 that up because I think that goes to sort of some other
8 issues that we raised in our letter that we filed last
9 night, which is, we've been doing our best to navigate
10 a shifting landscape on the defendants' side of the
11 case, one attorney to the next, everyone has to get up
12 to speed, representations are made, disclosures are
13 made, nobody knows what's going on. We have the fifth
14 and sixth attorney here now. I referenced in our third
15 footnote of the letter we filed last night --

16 THE COURT: Is Mr. Larkin the sixth you're
17 referring to?

18 MR. HARVIS: Yes.

19 THE COURT: He's only for the day, I'm sure.

20 MR. HARVIS: Okay, I won't count him.

21 THE COURT: You won't see him again.

22 MR. HARVIS: Fifth attorney. What I would
23 say is, we were given, and I gave the Court this as an
24 exhibit, the sergeant's memo book with a redaction that
25 prevented us from learning that there was another

1 officer that was actually at the scene that day. We
2 didn't know that. That wasn't part of the Rule 26
3 disclosures. It was never disclosed to this day. What
4 we did was, we were able to --

5 THE COURT: When were you given that?

6 MR. HARVIS: That was part of the, I
7 believe --

8 MS. FETT: The memo book?

9 MR. HARVIS: Yeah. Do you know?

10 MS. FETT: We were first given it in a very,
11 very redacted form, I want to say in maybe March of
12 this year.

13 MR. HARVIS: So we then --

14 THE COURT: So that was prior to the March
15 22nd conference.

16 MS. FETT: I think so.

17 MR. HARVIS: We don't dispute, your Honor,
18 that at the March 22nd conference, we hadn't done -- we
19 hadn't looked at the file closely enough to identify
20 every deposition that needed to be taken. We had not
21 done that at that point. In fairness, though, we don't
22 believe that there was any kind of -- there's a Federal
23 Rule or any order from the Court that would have
24 required us to do it by that date, when the discovery
25 period, so much of it remained.

1 THE COURT: I don't understand why you say
2 so much of it had remained because discovery was set to
3 close on March 19th.

4 MR. HARVIS: The reason I say that is
5 because the only reason that discovery was set to close
6 at that date and so little had happened is because of
7 the series of delays from the defendants. So my view
8 is, we were never given --

9 THE COURT: Wait, discovery was not set to
10 close on that date because of the problems that the
11 defendants were creating. It was set to close because
12 that was the case management plan. We set it, we set
13 the close of discovery like I do in ever case, and
14 discovery closed. You asked for an extension for the
15 very limited purpose of conducting the officer
16 depositions and the plaintiff and completing any
17 remaining document discovery. You knew about the
18 existence of this other officer.

19 MR. HARVIS: We did not.

20 THE COURT: Ms. Fett said that you had the
21 memo book sometime in March.

22 MR. HARVIS: Improperly redacted, so that
23 this officer's name was withheld. That was the state
24 of it at that time.

25 MR. BERGMAN: Your Honor, if I may.

1 THE COURT: Not yet.

2 MR. HARVIS: So my point is, your Honor,
3 that in fact, we didn't have anything because by giving
4 us a memo book where the name is redacted, we're not
5 provided with the information. So we're thankful that
6 that extension was granted providently by your Honor.

7 THE COURT: So you got a memo book with the
8 name of the officer redacted.

9 MR. HARVIS: And then --

10 THE COURT: Is it what appears in --

11 MR. HARVIS: No, it's not, unfortunately.
12 Here, I can hand it up to your Honor.

13 THE COURT: I've seen it.

14 MR. HARVIS: Yeah, last night.

15 THE COURT: It was in your letter last
16 night.

17 MR. HARVIS: Yeah. So you see how it only
18 gives that first line of the August 13th tour and then
19 it's a big block of redactions. Right below that line,
20 it says who his driver is.

21 THE COURT: Exhibit 1 or 2?

22 MR. HARVIS: It's Exhibit 2, Def-723.

23 THE COURT: Okay.

24 MR. HARVIS: Right below -- in that black
25 box right below the first entry for August 13th, it

1 lists the sergeant's driver. I forget but I think it's
2 like Sanchez. I don't remember off the top of my head
3 what his name is. Basically, we're given this raw
4 footage without the software to view it. I finally
5 track it down and I get my Mac to use the PC software
6 to watch this video, and we're able to see the video,
7 the part we've never seen before, after he's on the
8 ground and when the sergeant and his driver arrive, and
9 we see them both get out of the car.

10 If you read our April 4th email that was an
11 exhibit to our letter, one of the first things we say
12 is, what is going on with you not disclosing this
13 officer?

14 THE COURT: Wait a second. The first car
15 with the two defendants --

16 MR. HARVIS: Hits him or whatever.

17 THE COURT: Or whatever. Then another car
18 comes on the scene.

19 MR. HARVIS: The sergeant then verifies the
20 arrest. That's when this backpack search happens and
21 that's also caught on video. When you see the officers
22 in their text messages trying to tell the ADA that it
23 happened at the precinct, in the video, it actually
24 shows them searching at the scene. That's just as an
25 aside. So now we have that evidence and we go back to

1 them responsibly and say, who is this person thirteen
2 months into the litigation that you haven't disclosed?

3 THE COURT: So the sergeant and his driver
4 are relevant in what way?

5 MR. HARVIS: Well, they're fact witnesses to
6 his treatment. Instead of calling an ambulance for
7 him, they take him to the precinct. The sergeant and
8 the driver as a witness saw the sergeant agreeing that
9 that should happen. Someone who has just been in a car
10 accident without a helmet should be taken to the
11 precinct instead of the hospital. Then they're also a
12 witness to a medical treatment call not being made
13 until 6:08 p.m., a call I might add that has never
14 produced to us, even though those calls to IAB command
15 center are recorded. That's one of the things in
16 category one of our letter.

17 So my position is, there have been
18 inadequate disclosures by the defendants in addition to
19 these life events, and then a series of demonstrable
20 violations of the Court's orders on that side of the
21 table. All we've tried to do is navigate that
22 situation as best we can with candor, without violating
23 a single order. In terms of these depositions, which
24 is not part of our April 11th application at all, I
25 would just say these are brief depositions of people

1 who are clearly relevant witnesses.

2 THE COURT: Who?

3 MR. HARVIS: The ADA -- actually, I should
4 step back for a second. There's one other thing I want
5 to mention. It's not the only issue with the memo
6 book. When the arresting officer's memo book was first
7 produced to us, only his tour for August 13th was
8 produced, not his tour for August 14th.

9 By happenstance again, we later in discovery
10 got an unredacted version of the arresting officer's
11 memo book that showed that that August 14th event was
12 hugely relevant because it showed a 53-minute call with
13 the ADA, 53 minutes of conversation between the officer
14 and the ADA on the day following this event. Not only
15 was that improperly redacted in the first instance but
16 that clearly makes the ADA that that officer spoke to
17 an appropriate witness for a brief deposition. What
18 did the officer tell you, what was the conversation
19 like, what evidence did you learn and so forth? I
20 don't think that's controversial at all.

21 So for us to be making this about
22 depositions that are not a subject of the application
23 and are relevant and brief just strikes me as
24 unnecessary, when the actual documents at issue are so
25 basic and there's no real objection to producing them.

1 THE COURT: So who is it that you want to
2 depose?

3 MR. HARVIS: We want to depose the ADA who
4 had the call with the officer, the ADA who then went on
5 to prosecute the case, who we think also prepared --
6 we're in the process of getting the transcripts from
7 the criminal proceeding. We believe that there were
8 actually hearings in this case that the officers were
9 prepped for, where they talked about the backpack and
10 everything else, so those two ADA's. And then the
11 people who went to the hospital that night and took the
12 photographs that have never been produced to us and did
13 interviews that have never been produced to us. We
14 just want to know --

15 THE COURT: The people who went to the
16 hospital that night, what do you mean by the people?

17 MR. HARVIS: So IAB and I believe it's
18 Queens North sent investigators to the hospital. You
19 know how they do that after someone is hurt and they
20 say -- they interview them immediately without counsel
21 and it's recorded and they take photographs. So the
22 people who did those interviews were never disclosed as
23 witnesses with knowledge but we determined who they
24 were by documents. Those people took photographs of
25 plaintiff's injuries that have never been produced to

1 us, even though they're mentioned in all the documents.
2 We've been talking about this all over. So we want to
3 depose the people who took the photographs, once we get
4 the photographs, and the people who did the interviews,
5 once we get the interviews. Those depositions will not
6 be long.

7 THE COURT: And you know there are two
8 people?

9 MR. HARVIS: We know -- yeah. There's one
10 person who took photographs and interviewed the
11 sergeant and then there's one other person who took
12 photographs. The City never disclosed them as
13 witnesses but we have their names.

14 THE COURT: So that's two ADA's, someone
15 from IAB, someone from Queens North?

16 MR. HARVIS: Yes.

17 THE COURT: And what else?

18 MR. HARVIS: I think that's it. I have to
19 look back at the email.

20 THE COURT: In addition to the --

21 MR. HARVIS: The parties.

22 THE COURT: The parties.

23 MR. HARVIS: And this new officer who was
24 never disclosed.

25 MR. BERGMAN: Your Honor, on page I believe

1 10 -- sorry, the tenth exhibit to plaintiff's motion,
2 there's a list of eight categories of individuals that
3 are purported to be --

4 THE COURT: Exhibit 2 to plaintiff's letter?

5 MR. BERGMAN: Exhibit 10, sorry, your Honor.
6 It's page 6 of 20.

7 THE COURT: It's an email to Ms. Bardauskis.

8 MR. BERGMAN: Yes. There are three
9 defendants, your Honor, so it's not just an additional
10 four depositions that are being discussed.

11 MR. HARVIS: That's fair, I apologize. I
12 hadn't reviewed this --

13 THE COURT: Well, the defendants were
14 discussed at the March 22nd conference.

15 MR. BERGMAN: Yes, your Honor.

16 THE COURT: So they're not additional
17 depositions. Those are depositions that were --

18 MR. HARVIS: These are all individuals, your
19 Honor, who were there that night and participated in
20 the investigation. I have to say, not only -- we have
21 no intention of including these people as defendants,
22 although that officer on the scene is a separate issue.
23 But I'm more talking about, in one day, we could do all
24 these depositions. This is not meant to expand the
25 scope. We just want to cross our t's so that when we

1 go to trial, if they have relevant testimony, we can
2 call them.

3 THE COURT: I see Exhibit 10.

4 MR. HARVIS: It says, depositions to be
5 scheduled and there are eight people listed or eight
6 categories, the defendants --

7 THE COURT: Hold on.

8 MR. HARVIS: Take your time.

9 THE COURT: What page?

10 MR. HARVIS: It's page 6 of 20, your Honor.
11 This is the City's responsive email but it doesn't
12 matter.

13 THE COURT: Sergeant Cancellino (ph)?

14 MR. HARVIS: Can I tell you who these people
15 are?

16 THE COURT: Yes.

17 MR. HARVIS: Sergeant Cancellino was the
18 desk sergeant who called in plaintiff's injury, whose
19 phone call to IAB we haven't been provided with. So
20 he's a desk sergeant and he's also, by the way, the
21 person who marks plaintiff down as apparently normal
22 when he's brought to the precinct. Physical condition
23 apparently normal, when he's brought to the precinct
24 after this car accident, so we think he might have
25 relevant information.

11 THE COURT: One of the who?

12 MR. HARVIS: The escort officers that was
13 with --

14 THE COURT: Escort, okay.

15 MR. HARVIS: -- plaintiff at the hospital.

16 We think that's relevant because there's obviously a
17 dispute about the extent of plaintiff's injuries and
18 what was said between him and medical staff. Then
19 Kivlin (ph) is also someone who was investigating at
20 the hospital. Those are all people who have direct
21 knowledge from the day of the incident, who I know were
22 never disclosed by the City as witnesses with knowledge
23 at all.

24 MS. FETT: Your Honor, just to be fair --

25 MR. HARVIS: Except Cancellino.

1 MS. FETT: -- I think in defendants'
2 discrimination responses, they did identify Cancellino
3 and I think possibly Forgione.

4 THE COURT: In their --

5 MS. FETT: And Dibonay.

6 MR. HARVIS: I'm sorry, that's news to me,
7 your Honor, because I thought we had looked at the
8 responses last night. We can see their responses in
9 Exhibit 5, and this would be interrogatory number 1.

10 THE COURT: They identify Forgione and
11 Cancellino.

12 MS. FETT: And Dibonay.

13 MR. HARVIS: Okay, so I apologize, I mis-
14 spoke, your Honor. So those three were identified.
15 But all the more reason, in my opinion, why it's
16 appropriate to depose them.

17 THE COURT: Also appropriate to tell me
18 about it on March 22nd, right?

19 MR. HARVIS: If we had been asked and not
20 said it, your Honor, then yes.

21 THE COURT: You were asked. You were asked
22 what is -- discovery is done, right? No, it's not,
23 this is what we need to do. That's how it went down.

24 MR. HARVIS: I'm just saying the spirit of
25 candor is, what do you know at that moment? That's all

1 I'm saying is it was a mistake to not have a better
2 understanding but we did communicate our current
3 understanding at that time.

4 THE COURT: Yeah, but that's important.

5 MR. HARVIS: I'm not disputing that.

6 THE COURT: If you didn't do your job ahead
7 of time, that's your problem, not theirs, not mine.

8 MR. HARVIS: I completely agree, I
9 completely agree.

10 THE COURT: Ms. Fett only told me about four
11 depositions that needed to be done and she didn't
12 mention documents, although documents were mentioned in
13 the letter asking for the extension.

14 MR. HARVIS: I also just wanted to mention
15 that your Honor did say specifically that your Honor
16 even contemplated a supplemental discovery demand.

17 THE COURT: Post-deposition.

18 MR. HARVIS: Right.

19 THE COURT: Not -- what else do you have to
20 say?

21 MR. HARVIS: Let me think. I feel like
22 that's pretty much it. I feel like -- I just want to
23 say I believe that this has been, in my opinion,
24 handled in a transparent, good-faith way, where there
25 can't be an argument made that we didn't meet and

1 confer completely adequately with the City. They were
2 on notice about this stuff for over a year. I also
3 would just add that they don't have a merits objection
4 or they don't have a legitimate merits objection to
5 this material, much of which should have been submitted
6 -- mandatory disclosures. So we think that the Court
7 should grant our application and compel them to produce
8 the material.

9 THE COURT: Who is -- you still don't know
10 who the --

11 MR. HARVIS: Driver.

12 THE COURT: -- the driver is?

13 MR. HARVIS: We know his last name from the
14 memo book that was reproduced but we don't know his
15 full name or shield number.

16 THE COURT: But Sergeant -- is it Sergeant
17 Forgione?

18 MR. HARVIS: No, it's Starrantino and he's
19 already a defendant. The actual sergeant is a
20 defendant in the case.

21 THE COURT: I see, so it's the driver.

22 MR. HARVIS: Correct.

23 THE COURT: You haven't received any
24 disciplinary files at all.

25 MR. HARVIS: Not one, your Honor.

1 THE COURT: Did you receive the unredacted
2 summaries or -- I forget what they call them.

3 MR. HARVIS: We did receive summaries; they
4 were redacted. We were never provided -- because we
5 serve a specific interrogatory for this purpose, asking
6 the City to identify the withheld categories of
7 material, which we think is the spirit of Rule 26(b)(5)
8 because it allows us, if appropriate, to challenge what
9 they're withholding. They never responded to that.
10 That's our interrogatory 9. Then they redacted the
11 summaries and the summaries I believe are from 2016
12 that were produced to us. And then they never followed
13 up with any files. That's where we are.

14 THE COURT: Even the -- what was not
15 redacted, they didn't send you the files after that?

16 MR. HARVIS: That's correct.

17 THE COURT: Again, what is the documented
18 injury here?

19 MR. HARVIS: We have an expert report --
20 there was a bulge in his back that he never had before,
21 and we have an expert report from a board-certified
22 physician who is saying that it's causally related to
23 this accident and it's permanent and disabling.

24 THE COURT: What is it, though?

25 MR. HARVIS: It's a bulging disk, your

1 Honor.

2 THE COURT: Okay, so he has a bulging disk.

3 How old is this guy?

4 MR. HARVIS: He's in his twenties, his mid-
5 twenties.

6 THE COURT: How does he know that it wasn't
7 there before?

8 MR. HARVIS: Well, we have a doctor saying
9 that this was the cause and I think that it's diagnosed
10 as a new injury when the MRI's are done. That would be
11 the defense argument but I think that's in any case
12 with a bulging disk, they can make that argument.

13 THE COURT: All right.

14 MR. BERGMAN: Your Honor, if I may. First,
15 plaintiff has represented numerous times during this
16 conference that the delay of this case was caused by
17 defense counsel, but the transcript of the March 22nd
18 conference flies directly in the face of those
19 allegations. If your Honor will turn to page 2 of the
20 transcript, Ms. Fett stated at the bottom of the page
21 that the reason that the depositions weren't able to go
22 forward was because of her trial schedule. It is true
23 that some of the ACC's assigned --

24 THE COURT: That has nothing to do with not
25 producing documents, though, right?

1 MR. BERGMAN: Yes, your Honor, but at the
2 time that the parties were contemplating taking
3 depositions, plaintiff didn't raise the fact that they
4 needed particular documents, just those depositions.

5 THE COURT: It was raised in the joint
6 letter.

7 MR. BERGMAN: Your Honor, not to take
8 depositions. They indicated that they needed the
9 documents but this is the first indication that they
10 needed documents to take depositions.

11 THE COURT: Everybody needs documents to
12 take depositions.

13 MR. BERGMAN: Your Honor, they do have
14 documents, which is why they didn't get it during the
15 conference. Discovery was substantially completed,
16 although --

17 THE COURT: You didn't produce the
18 disciplinary files.

19 MR. BERGMAN: Sorry, your Honor?

20 THE COURT: The disciplinary files were
21 requested and you didn't produce them, right? Not you,
22 not you, but --

23 MR. BERGMAN: Of course, your Honor.

24 THE COURT: Defendants.

25 MR. BERGMAN: Yes, your Honor. Your Honor,

1 we objected to producing those in our disclosures and
2 plaintiff waited until essentially the close of
3 discovery to then ask for those files. It's not as if
4 we said we were turning them over and then didn't. We
5 objected, plaintiffs waited --

6 THE COURT: What is the basis for the
7 objection?

8 MR. BERGMAN: Your Honor, there are numerous
9 bases. One, we don't think it's proportional to the
10 needs of this case. This is essentially a car
11 accident, and most of the files that have been
12 requested were from the sergeant who responded to the
13 scene after the incident. So he may have some factual
14 knowledge but with respect to any force allegations
15 against him, he wasn't purported to be involved in the
16 force that was used in this case.

17 THE COURT: Well, disciplinary files of the
18 -- in the redacted disciplinary histories for what I'll
19 call the main defendants, the guys who were in the car,
20 officers who were in the car, was there anything
21 indicated in their histories that was of a similar
22 nature, excessive force, anything like that?

23 MR. BERGMAN: Yes, your Honor. We certainly
24 indicated any files that would have been responsive and
25 then we never received a subsequent request for those

1 files. To specifically answer your question, your
2 Honor, I have the documents in front of me --

3 THE COURT: Why do you need a subsequent
4 request?

5 Did you ask for disciplinary files in your
6 first request?

7 MS. FETT: Yes, we did, your Honor.

8 MR. HARVIS: It's in document request 3,
9 your Honor, and that's Exhibit 4, your Honor.

10 THE COURT: 3(c), Internal Affairs resume
11 and underlying files.

12 MR. BERGMAN: Your Honor, we objected.

13 THE COURT: How can you object when I've
14 written on this and your office knows -- I think I
15 wrote on that in 2007.

16 MR. BERGMAN: 2006, your Honor.

17 THE COURT: 2006?

18 MR. BERGMAN: I believe so, your Honor.

19 THE COURT: The year I started. You know
20 that's my standard practice.

21 MR. BERGMAN: Yes, your Honor.

22 THE COURT: So you're still objecting?

23 MR. BERGMAN: We object --

24 THE COURT: Have I changed my position over
25 time?

1 MR. BERGMAN: I would imagine not, your
2 Honor. That said, we did object at the outset because
3 we thought they weren't proportional to this given sort
4 of the complexity and sort of the requirements of this
5 case, specifically given that a lot of the allegations
6 against these officers which were unsubstantiated
7 didn't appear related to the incident in so far as
8 they're against a sergeant, who again is not purported
9 to have used any force here.

10 THE COURT: But you produced indexes that
11 were unredacted for certain things for these officers,
12 which is at least a tacit admission that it's relevant.

13 MR. BERGMAN: Your Honor, we produced things
14 that were similar in purported nature, that were
15 excessive force or I believe touched on veracity. That
16 said, just because there's an unsubstantiated
17 allegation of force or veracity doesn't mean that we
18 think it's relevant. It's just the type of case that
19 most closely correlates with the instant allegations.
20 Again, your Honor, plaintiffs were aware that they
21 didn't have these files when they were trying to
22 schedule the depositions and had not sent in a request
23 or asked us for them in the approximately four months
24 when they were contemplating dates.

25 MR. HARVIS: That's not true. They were in

1 our emails, repeated emails. We specifically asked for
2 the files. We asked for them in September and we asked
3 for them in November of 2017.

4 MR. HARVIS: Your Honor, the parties were
5 discussing depositions in March. While we're waiting,
6 your Honor, I just wanted to mention, the history that
7 was provided for the arresting officer is dated August
8 28th, 2015. That's the date that the summary was
9 prepared, almost three years ago.

10 MR. BERGMAN: Your Honor, plaintiffs are
11 making allegations regarding negligent hiring
12 retention. Then the only pertinent information would
13 be with respect to things that happened prior to the
14 incident date. Allegations that arose after would have
15 no bearing on whether or not there is a negligent
16 hiring claim, for example.

17 THE COURT: I cut you off. You were saying
18 something else.

19 MR. BERGMAN: Sorry, your Honor, that
20 escapes me.

21 THE COURT: It escapes me, too. So you
22 didn't produce the underlying files because you say
23 it's not proportional.

24 MR. BERGMAN: Yes, your Honor, among other
25 objections that we lodged.

1 THE COURT: You refer to this as a car
2 accident.

3 MR. BERGMAN: Yes, your Honor.

4 THE COURT: That's your client's version of
5 it.

6 MR. BERGMAN: Your Honor, our version of
7 events is that the defendant -- granted, the video is
8 unclear. Either there was some sort of negligence or
9 he hit the car next to him that was parked and he fell.
10 Plaintiff testified during his 50(h) hearing --

11 THE COURT: That's again your client's
12 version: It's either negligence or he hit another car.
13 His version is that they ran him down.

14 MR. BERGMAN: Yes, your Honor, but
15 plaintiff --

16 THE COURT: And a jury could -- because the
17 video is unclear, a jury could say -- could agree with
18 him that they ran him down. If they ran him down, how
19 are the disciplinary files disproportionate?

20 MR. BERGMAN: Your Honor, the disciplinary
21 files that were sought by and large were against the
22 individuals that were driving the car rather than
23 against the sergeant, who wasn't there at that point.
24 Additionally, your Honor --

25 THE COURT: Maybe you can make the argument

1 that the disciplinary files of the sergeant are not
2 proportionate to the claims but are there any -- I
3 asked you previously, were there any disciplinary files
4 for these two officers that were in the car? You said
5 yes, there was stuff that was unredacted. We didn't
6 think it's relevant because it's disproportionate.

7 MR. BERGMAN: Your Honor, I'm looking at the
8 officers' disciplinary documents that were provided to
9 counsel, and I see that there is an allegation
10 regarding missing property but I do not see anything
11 regarding force that was not turned over. Sorry, let
12 me rephrase, that there was a CCRB complaint that was
13 unsubstantiated involving force.

14 THE COURT: Against one of the officers in
15 the car that was involved in the initial incident.

16 MR. BERGMAN: I believe so, your Honor. The
17 plaintiff actually didn't raise that in their motion
18 that's currently pending for that file.

19 THE COURT: But they originally asked for
20 it. They asked for IAB, CCRB indexes and underlying
21 files.

22 MR. BERGMAN: Yes, your Honor.

23 THE COURT: It's hard to say what's
24 proportional when we don't know the full extent of the
25 plaintiff's injuries. If he has a herniated disk

1 that's caused by getting run over or run into by a
2 police vehicle, with herniated disks, the verdicts are
3 all over the place.

4 MR. BERGMAN: Your Honor, if I may also,
5 just to provide the Court with a little bit more
6 information, we also objected to turn over
7 investigations that were open. As we sit here today,
8 I'm not entirely sure whether there are similar
9 instances that are or were open at this time, but that
10 was an objection that we also lodged at the time. So I
11 slightly mis-spoke earlier and I just want to correct
12 the record for that.

13 THE COURT: The sergeant is a defendant,
14 currently.

15 MS. FETT: Yes, your Honor.

16 THE COURT: You've identified -- I
17 understand my Frails decision but how is excessive
18 force against the sergeant, when he wasn't involved in
19 the excessive force. How is that relevant?

20 MR. HARVIS: I agree that the relevance is
21 diminished but I would suggest that it would be -- the
22 vehicle would come under supervisory liability, which
23 allows for five different categories of supervisory
24 liability and subordinate conduct, assuming that the
25 officer created a custom that allowed it to happen such

1 as if he was grossly negligent in his supervision of
2 his subordinates, that would allow that supervisor to
3 be held liable for even the excessive force that was
4 done by these officers. I agree these facts aren't --

5 THE COURT: Yeah, but that's still one step
6 removed from that supervisor himself having allegations
7 of excessive force against him.

8 MR. HARVIS: I think it would go along the
9 lines of the Ismael v. Cohen sort of logic that if you
10 can establish a pattern of conduct in the supervisory
11 context, where he's -- let's say the allegations of
12 excessive force are where his subordinates are
13 constantly hurting people, and instead of taking them
14 for treatment, they're bringing them to the precinct
15 and marking them down as apparently normal and
16 fabricating records about it. I think we could develop
17 the sort of practice that the Cohen court was thinking
18 about.

19 THE COURT: But this sergeant didn't --
20 these officers didn't say he was normal, right?

21 MR. HARVIS: Someone said it. It was
22 recorded in the command log that he was normal.

23 THE COURT: But you said that was the desk
24 sergeant.

25 MR. HARVIS: Correct. He's the one who

1 wrote it down but we don't know where he got the
2 information from because we haven't deposed him. But I
3 guess for me, it really is a step further than that
4 because I'm just learning now for the first time that
5 some of these redactions that were never explained to
6 us from these summaries in 2015 were things that were
7 just open.

8 MR. BERGMAN: Your Honor, that was in our
9 discovery responses, that we were only producing things
10 that were open.

11 MR. HARVIS: Right, but we didn't know
12 specific --

13 THE COURT: That you were only producing
14 things that were open?

15 MR. BERGMAN: Sorry, that we were not
16 producing things that were open.

17 MR. HARVIS: Right. We were not told that
18 any specific redactions to these documents were made
19 because the allegations were open. They may have made
20 that in their boiler plate, general objections but we
21 didn't know that. So not only are we stale but we had
22 no way of actually knowing or challenging --

23 THE COURT: You got no privilege log?

24 MR. HARVIS: We had a privilege log but it
25 did not say, these redactions were because this was

1 open, these redactions were because this was this
2 category. We had none of that information to
3 meaningfully challenge it, and that's why we asked for
4 in camera review. But under King v. Condi, your Honor
5 is only obligated to do in camera review if they can
6 justify with good cause the redactions that they've
7 made. So we think that there really shouldn't be any
8 redactions here.

9 MR. BERGMAN: Your Honor, in the privilege
10 log, it indicated that documents were being withheld
11 because there were open or pending allegations.

12 MR. HARVIS: It doesn't tell us which ones
13 or how many or that there were any specific redactions
14 made because of that or which page it was on.

15 MR. BERGMAN: It does.

16 MR. HARVIS: Which pages?

17 MR. BERGMAN: It gives page (ui) anyway.
18 For example, on defendant's Exhibits 722 to 725, it
19 indicates --

20 THE COURT: I want to go back to his
21 injuries. So he allegedly has a herniated disk or a
22 bulging disk.

23 MR. HARVIS: A bulging disk, that's right,
24 at the time -- we see the injury on the tape but then
25 they admit that he has -- scrapes off his arm. They're

1 taking photographs of his face and his wrist that we
2 haven't seen, so it's hard for us to say exactly the
3 extent of those injuries or what they will show.

4 THE COURT: Well, he knows what his injuries
5 are. He doesn't need someone to show him pictures to
6 know. He can tell you what happened.

7 MR. HARVIS: Well, he was in extreme pain.
8 The contemporaneous hospital records --

9 THE COURT: Yeah, but the pain goes away
10 eventually. Come on, how could he not know what his
11 injuries are? A plaintiff has to know what their
12 injuries are.

13 MR. HARVIS: We have an expert report that
14 says what they are and that they're, with a reasonable
15 degree of medical certainty, causally related to this
16 incident, that they're permanent.

17 THE COURT: So how does -- wait, if you
18 haven't seen pictures, how does the expert know about
19 the scrapes and all that? The scrapes aren't
20 permanent, right?

21 MR. HARVIS: Nothing but the bulging disk is
22 alleged to be permanent, and that's not photographable.

23 THE COURT: So you've got a bulging disk.

24 MS. FETT: Your Honor, there's also a wrist
25 injury.

1 THE COURT: What is the wrist injury, soft
2 tissue? He's hurt -- he sprained his wrist or what?

3 MS. FETT: Yeah, it's not a fracture.

4 THE COURT: So he got a sprained wrist and a
5 bulging disk. Is there any documented medical records
6 outside of this expert that discusses symptoms related
7 to the bulging disk?

8 MR. HARVIS: Yes. He had to go to physical
9 therapy for a series of at least six months. He had
10 injections in his back, cortisone I believe, some kind
11 of injections. I just want to note that this case for
12 us is about substantially more than this physical
13 injury and the actual moment of force. It's about the
14 fabrication of evidence that is really egregious here,
15 where they claimed repeatedly in sworn documents that
16 he flailed his arms. I don't know if your Honor had
17 the chance to actually look at the video.

18 THE COURT: Yes.

19 MR. HARVIS: But it's very difficult for me
20 or I think a jury to understand why sworn allegations
21 are being repeatedly made that he's flailing his arms.
22 That's the only thing that they say justified his
23 arrest.

24 THE COURT: How long -- he was locked up for
25 how long?

1 MR. HARVIS: 24 hours, and then he was
2 facing trial. He had to go to hearings, he had to
3 appear in court regularly.

4 THE COURT: How long was the litigation?

5 MR. HARVIS: The criminal case?

6 THE COURT: Yeah.

7 MR. HARVIS: I have to check. We think it
8 was about a year, your Honor, but certainly long enough
9 for the case to go to hearings.

10 THE COURT: Did he have a retained attorney
11 or was he provided an attorney through 18(b) Legal Aid?

12 MR. HARVIS: Legal Aid, I think.

13 THE COURT: So no out-of-pocket for the
14 attorney. What about lost wages, anything?

15 MR. HARVIS: We're not claiming lost wages.

16 THE COURT: Okay.

17 MR. HARVIS: Just because we don't know if
18 we can show causation on the loss of his job.

19 THE COURT: A bulging disk, injections, PT
20 for six months.

21 MR. HARVIS: The expert that we retained
22 does put some numbers on his ongoing future expected
23 medical expenses.

24 Did we bring a copy of the report?

25 MS. FETT: I don't have it.

1 MR. HARVIS: We don't have a copy with us,
2 your Honor, but I just wanted to say there are -- when
3 you're so young and you have an injury like that, if
4 you can prove causation, there's certainly a
5 possibility that it could be problematic later in life.

6 THE COURT: So he's betting the farm on
7 this, huh?

8 MR. HARVIS: I'm not sure --

9 THE COURT: Have you made a statement
10 demand?

11 MR. HARVIS: We did early on. There's been
12 no offer.

13 THE COURT: Is this a no-pay case?

14 MR. BERGMAN: No, your Honor, it's not.

15 THE COURT: How come you didn't make an
16 offer after getting a demand?

17 MR. BERGMAN: Your Honor, I'm not sure that
18 we did. I know that we have authority on the case. I
19 don't think it's quite to the level that plaintiffs are
20 asking for, but this case has been evaluated and it was
21 not marked no pay.

22 THE COURT: Didn't I say you're over-
23 litigating this case? Didn't I tell that to you and
24 Ms. Bardauskis?

25 MS. FETT: You didn't use the word over-

1 litigating but you hoped that we could reach a
2 settlement. Plaintiff made a demand in February of
3 2017 with the very first ACC. We've been open to
4 settlement discussions. What happened after Mr. Oliner
5 left the office -- if I just may take a moment, your
6 Honor.

7 Mr. Oliner at the initial conference
8 specifically asked for you not to set a schedule
9 because he thought he could settle the case, and you
10 didn't set a schedule. You held it in abeyance. I had
11 already given him a demand by that initial conference.
12 We never received an offer. Then I believe it was
13 months later, the case was reassigned. What I did
14 affirmatively was give Ms. Bardauskis everything I had
15 given Mr. Oliner because I believe I gave him documents
16 pre-discovery to see if we could work this out.

17 I had to give her everything over again
18 because for some reason, she didn't have it from the
19 prior attorney. So I gave her everything again, gave
20 her our demand and said, we're reasonable, let's see
21 what we can do. It was a sense of just starting over.
22 I do believe that Ms. Bardauskis and I were agreeing a
23 lot on a lot of things, and that's why you see my
24 emails asking for things and pushing her, but she was
25 also agreeing to get it to me, and so we felt we didn't

1 need to bring it to the Court.

2 Your Honor has gone off the record on a
3 couple of conferences to try to get it done, and what
4 your Honor had said was, don't spend money on experts,
5 why can't we get this done? My impression from our
6 last conference was that defendants are I think nowhere
7 near five figures. I think we're just so far apart. I
8 believe that the negotiations haven't been in good
9 faith because I made this demand in February of 2017
10 and your Honor has been encouraging defendants to make
11 some kind of offer.

12 THE COURT: Was it a six-figure demand?

13 MS. FETT: Yes.

14 MR. HARVIS: Very low, very low six figures.

15 MS. FETT: Low six figures.

16 MR. HARVIS: As low as it gets.

17 THE COURT: Bulging disk, 24 hours, a year
18 of criminal case, six months of PT, injections. That's
19 not worth at least five figures, where the video is
20 unclear?

21 MR. BERGMAN: Your Honor, our office is
22 constantly evaluating cases. At the outset, I do not
23 believe that (ui) on the case. There have been
24 subsequent conversations internally and we're still
25 continuing to evaluate it. We do understand --

1 THE COURT: The longer it takes to evaluate
2 it, the more continuing evaluation you have, the more
3 it costs your client in time and effort. And it's hard
4 to come up with a proportionality argument when -- I
5 don't understand why you need more time. You know what
6 you know and apparently, you don't want to know any
7 more because you don't want to do any more discovery.

8 MR. BERGMAN: Well, your Honor, we certainly
9 want to take depositions of the three defendants and
10 the plaintiff. That said, obviously, as I just came on
11 to this case, I will be bringing it back to the office
12 and reflecting your Honor's questions.

13 THE COURT: Are there pictures of his
14 injuries?

15 MR. BERGMAN: Your Honor, there's a mug shot
16 pedigree form that I observed, that I believe was
17 turned over, that shows at least his face in apparently
18 normal condition. I understand that there may have
19 been photos taken and our office is currently
20 attempting to receive those photos, but I have not
21 personally seen them yet.

22 THE COURT: Who took them?

23 MR. BERGMAN: Your Honor, it's my
24 understanding -- this is a conversation that
25 plaintiff's counsel and I actually talked about last

1 night when we met and conferred. We are in the process
2 of trying to receive those and I believe there were
3 some of the investigators that were --

4 THE COURT: What does that mean, we are in
5 the process of trying to receive them? I know it's
6 like pulling teeth getting anything from the police
7 department. I've been doing this for twelve years.

8 MR. BERGMAN: Yes, your Honor. We've
9 contacted our clients and expressed the immediacy that
10 we need them and we are following up regularly --

11 THE COURT: When was the first time that
12 they were asked for?

13 MR. BERGMAN: Your Honor, we do not know --
14 let me rephrase that, your Honor. We specifically most
15 recently asked for them I believe either on the 10th or
16 the 20th. There was -- requests that were put on on
17 those dates. I don't specifically remember which of
18 those periods, but we've also been working with P.D.
19 legal to try to get those documents in an expedited
20 fashion.

21 THE COURT: From the perspective of
22 continuing to evaluate, you'd think you'd want to see
23 those, right?

24 MR. BERGMAN: Yes, your Honor.

25 THE COURT: And you haven't sent him to an

1 expert, have you?

2 MR. BERGMAN: We haven't sent plaintiff to
3 an expert?

4 THE COURT: Yeah, to examine him, to look at
5 the medical records and to opine on whether he has a
6 bulging disk and whether the bulging disk is causally
7 related.

8 MR. BERGMAN: Your Honor, I think we only
9 recently learned that plaintiff intended to use an
10 expert. We're in the process, from what I understand,
11 of trying to obtain one, but that is an ongoing --

12 THE COURT: Ms. Fett, what have you got to
13 say about that?

14 MS. FETT: That's completely incorrect. We
15 have said from the beginning that we -- probably in the
16 first conference, I said we may. But as the litigation
17 went on, I was very firm that our client was going to
18 be seeing an expert, and we produced our expert
19 disclosures according to the schedule.

20 THE COURT: When was that?

21 MS. FETT: Our disclosures were due April
22 13th and they've all been produced.

23 MR. BERGMAN: Your Honor, I do believe we
24 received those on the 13th.

25 THE COURT: Did I give them a date to

1 produce --

2 MS. FETT: You did not, your Honor.

3 THE COURT: Did we discuss that at the March
4 22nd conference?

5 MS. FETT: I think so, your Honor.

6 MR. BERGMAN: Your Honor, I believe Ms.
7 Bardauskis followed up with chambers and indicated that
8 we were supposed to provide our response or indicate
9 who our experts were by the close of discovery on the
10 18th. Then I believe that the order contemplated
11 depositions being done of experts during the period
12 where we work on the JPTO, but I could be mistaken as
13 to that.

14 THE COURT: It says expert disclosures due
15 April 13th. That's what the docket says.

16 MR. BERGMAN: Yes, your Honor.

17 THE COURT: Discovery to close on May 18th.
18 Does the transcript give any further discussion?

19 MR. BERGMAN: I believe it does, your Honor.

20 MR. LARKIN: On page 10, your Honor, there's
21 a discussion about it, where I believe Ms. Fett at the
22 bottom states, I'm still going forward on that
23 understanding. Everything has to be completed,
24 including if there's going to be expert discovery by
25 May 18th. That's the bottom of page 10, and then on the

1 next page, page 11, line 20, your Honor says, April 13th
2 for any expert disclosure from the plaintiff.

3 THE COURT: So you have until May 18th.

4 MR. LARKIN: Right.

5 THE COURT: We'll give the defendant until
6 May 18th. Have you set that up yet?

7 MR. BERGMAN: Your Honor, we're in the
8 process of that.

9 MR. HARVIS: Can I raise one other thing,
10 your Honor?

11 THE COURT: Sure.

12 MR. HARVIS: We just haven't touched on the
13 issue of the electronic communications and I just
14 wanted to mention that there can be no dispute that
15 document request number 6 served on March 13th, 2017
16 asked these officers to produce relevant electronic
17 communications, and their responses are nonsubstantive.
18 There's no indication that any search was conducted.
19 The only reason we have any text messages is because
20 they happen to be in the D.A. file, which I've never
21 even seen before. So we believe that, especially given
22 these concerning text messages, that they ought to do a
23 search. They're clearly in communication about this.
24 That's Exhibit 3, your Honor.

25 THE COURT: What document request?

1 MR. HARVIS: It's our document request
2 number 6 from Exhibit 4, your Honor.

3 THE COURT: So what happened there?

4 MR. BERGMAN: Your Honor, we provided the
5 text messages that were in the District Attorney's file
6 between some of the individuals at issue here but the
7 nature of the request was incredibly broad. It was
8 unclear exactly what they were referring to.

9 THE COURT: Well, you have all your general
10 objections that you make.

11 MR. BERGMAN: Yes, your Honor.

12 THE COURT: And then you say,
13 notwithstanding and without waiving or in any way
14 limiting the general objections or these specific
15 objections. Defendants state that they are not
16 withholding any information on the basis of the
17 objections herein and are continuing to search for
18 information responsive to this request and it will be
19 produced within thirty days. Whether it was Ms.
20 Bardauskis or whomever, all they do is look at what
21 other people -- entities gave the City and see if there
22 are any text messages and then produce those?

23 MR. BERGMAN: Your Honor, there were the
24 texts in the D.A. file. It's my understanding that the
25 officers were asked if there were text messages, but I

1 can go back and confirm that.

2 THE COURT: These are text messages from --

3 MR. HARVIS: Between the two main
4 defendants.

5 THE COURT: Yeah, I'm just trying to look at
6 the -- this is --

7 MR. HARVIS: They're getting ready to meet
8 with the D.A. and they want to make sure they know --

9 THE COURT: What month and year.

10 MR. HARVIS: Let me see if we have that.

11 Oh, yes, March 22nd. I don't know the year.

12 MS. FETT: It's got to be 2016.

13 MR. HARVIS: It would make sense for it to
14 be 2016.

15 THE COURT: So what would you suggest we do
16 with that?

17 MR. HARVIS: I think that they should be
18 required to provide a substantive response that either
19 indicates provides responsive material, which we know
20 there is at least these messages, and says that a
21 search has been conducted and there's nothing that's
22 been provided. In other cases, the judges have ordered
23 -- Judge Levy for example has ordered the defendants to
24 just execute a thing that says, I conducted a search of
25 my emails and phone and I see no relevant messages with

1 this officer. I've reviewed them. Or certification at
2 the very least by counsel that that's happened. Write
3 it, which is what the rules require.

4 MR. BERGMAN: Your Honor, I don't have our
5 requests in front of me but I'm sure that we asked for
6 similar information, and we didn't receive any
7 certification from plaintiff that he went through his
8 phone and told everybody who he got into accident with
9 and what occurred in that instance. Asking for a
10 certification on this kind of flies in the face of the
11 general discovery that takes place in these cases.

12 MR. HARVIS: I'm just asking for a response
13 consistent with Rule 34, where if they're -- they have
14 to tell us what they're withholding and they have to
15 tell us what the actual answer is to what we're asking
16 for. So here, we're just getting, I'm going to tell
17 you in thirty days, and then nothing. We're not seeing
18 any objections, so I think they should be compelled to
19 answer substantively.

20 THE COURT: Have you figured out who the
21 driver is?

22 MR. BERGMAN: Your Honor, I first found out
23 that this was an issue last night at approximately
24 11:30. That said, plaintiff I believe was provided the
25 roll call. If they knew the last name, then they

1 should have been able to discern the identity of the
2 individual, to the extent they want to take a person's
3 deposition.

4 THE COURT: Do you know the last name of the
5 driver?

6 MR. HARVIS: Yeah. We have it in the --
7 it's a very common last name and we have it -- I have
8 to check the legibility of the roll call because just
9 from glancing through it recently, I'm not 100% sure
10 that it's of a usable form.

11 THE COURT: They're handwritten roll calls?

12 MR. HARVIS: No, it's typewritten but we
13 usually get the after they've been photocopied twenty
14 times. So often, you can't make it out. But that
15 person clearly is a witness with knowledge under Rule
16 26, so I'm not sure why we need to go hunting through
17 documents to find it, but certainly we'll do that if
18 it's possible. I have no objection to doing that. The
19 rules allow them to refer us to documents if they want
20 to do that, but we haven't gotten a reference to the
21 page.

22 THE COURT: Let's go off the record for a
23 second.

24 (Tape off, tape on.)

25 THE COURT: -- granting in part.

1 MR. LARKIN: Are we on the record? I'm
2 sorry.

3 THE COURT: Are we on the record?

4 THE CLERK: We were off the record.

5 THE COURT: Okay. Thank you, Mr. Larkin.

6 MR. LARKIN: I'm sorry, Judge.

7 THE COURT: My apologies. We're back on the
8 record. We had a colloquy that should have been on the
9 record that inadvertently wasn't, so I'm going to issue
10 the ruling.

11 The motion to compel is granted in part.

12 The depositions of the ADA's -- there are two of them,
13 IAB and the Queens North officer who did the initial
14 IAB investigation, those are denied. The depositions
15 of the plaintiff and the defendants will go forward.

16 MR. HARVIS: The fourth officer, your Honor,
17 that was never disclosed, we would ask that that person
18 -- a deposition be allowed for that person.

19 THE COURT: The driver?

20 MR. HARVIS: The driver.

21 THE COURT: Yes, you can have his
22 deposition.

23 MR. HARVIS: Thank you, your Honor.

24 THE COURT: The specific items requested on
25 pages 2 and 3 of the motion, documents and other

1 things, those are granted in part. As far as text
2 messages between officers Zheng and Chen, defendants
3 are to double back to those officers, ask them to do a
4 search of their cell phones. If there is anything that
5 is relevant that are in the phones that has not already
6 been produced to the -- it was to the District
7 Attorney?

8 MR. BERGMAN: I believe so, your Honor, yes.

9 THE COURT: Those are to produced along with
10 a declaration from them that they've done the search,
11 they've produced what's relevant.

12 The disciplinary records for the two
13 officers that were not redacted, the underlying
14 records, IAB, CCRB, whatever, those records are to be
15 produced. I'm denying it for the sergeant. I see it
16 as being tangential at best and disproportionate to the
17 claims.

18 MR. HARVIS: May I just note our exception,
19 your Honor, to the extent that there are any --

20 THE COURT: Is that a state court practice,
21 an exception?

22 MR. HARVIS: I'm sorry. I see it in
23 transcripts all the time so I think people do it.

24 THE COURT: I don't know what it means.

25 MR. HARVIS: I just wanted -- what I wanted

1 to do is just to say that as to the excessive force,
2 that makes sense. If there's something where someone
3 was not brought for medical treatment promptly, I do
4 believe that's squarely relevant here within the
5 allegations against the sergeant, and that that ought
6 to be an exception to the ruling.

7 THE COURT: Did you produce the indexes or
8 the histories for the sergeant?

9 MR. BERGMAN: Yes, your Honor.

10 THE COURT: Go back and look at the clean
11 copy, the unredacted copy. If there's anything along
12 those lines, not bringing someone in for medical
13 treatment, produce the underlying records.

14 MR. BERGMAN: Yes, your Honor.

15 THE COURT: If there's not, then let counsel
16 know.

17 MR. BERGMAN: If I may just ask for a
18 clarification on that point. I don't know of the
19 existence of any but with respect to any such
20 investigation that's open, are we required to turn
21 those over?

22 MR. HARVIS: May I be heard on that, your
23 Honor.

24 THE COURT: Yeah. I didn't talk about that
25 in Frails, did I?

1 MR. HARVIS: Not in Frails but Judge Ellis
2 has a decision from the Southern District that's
3 squarely on point about this. He considers the
4 argument about open files and rejects it out of hand.
5 I'm happy to provide it in a supplemental letter to
6 your Honor.

7 THE COURT: I don't know how that makes a
8 difference because if -- regardless of outcome,
9 substantiated or unsubstantiated, if they're to be
10 produced --

11 MR. HARVIS: Well, they also tend to leave
12 these things open for years and years, so sometimes
13 it's never closed.

14 THE COURT: It doesn't matter. Regardless
15 of outcome, if they're produced, substantiated or
16 unsubstantiated, then why does it matter whether it's
17 open or closed?

18 MR. BERGMAN: Your Honor, there are numerous
19 reasons why. Since it actually does or can impact the
20 investigation, in a case like this, for example, where
21 there's already been some sort of press attention given
22 to it, it can implicate or affect the investigation
23 itself. Also, to the extent that officer --

24 THE COURT: If we have a confidentiality
25 order in place and can't disclose that, how would that

1 affect the investigation? It's not going to the press.

2 MR. BERGMAN: Your Honor, also, if the
3 officers are required to provide testimony on things
4 that are open, it could also impact the investigation
5 in some regard.

6 MR. HARVIS: What Judge Ellis looked at,
7 your Honor, were the requirements for actually
8 asserting the law enforcement privilege, which is what
9 they're trying to do here, and they're onerous. If you
10 look at King v. Condi, there have to be declarations.
11 There has to be a specific factual showing as to how
12 the investigation is going to be impacted from a high-
13 ranking official, those sort of things. It can't be
14 generalized, it might do this, it might do that. If in
15 a specific instance, something is threatened, allow
16 them to seek a protective order. That's what the rules
17 provide for.

18 THE COURT: I don't understand how it
19 affects a law enforcement privilege. If officer
20 statements, testimony given in the context of an IAB or
21 CCRB investigation is produced at the end of the day,
22 regardless of whether it's substantiated or
23 unsubstantiated, how does that implicate the law
24 enforcement privilege?

25 MR. BERGMAN: Your Honor, it's more that the

1 officers have allegations pending against them and
2 they're providing testimony with respect to same. So
3 it's a two-fold issue: One, it actually impacts the
4 officers in so far as they're providing testimony --

5 THE COURT: I see, they're providing
6 testimony in this case.

7 MR. BERGMAN: Potentially, your Honor, if
8 they're asked questions at depositions, for example,
9 along those lines.

10 THE COURT: You can deal with that with an
11 objection at a deposition, instruction not to answer,
12 right?

13 MR. BERGMAN: Potentially, your Honor.

14 THE COURT: But at the same time, Mr. Harvis
15 and Ms. Fett should be entitled to see this open
16 complaint and go talk to the complaining witness, see
17 what they have to say, see if somehow they can get it
18 into the case, which is difficult.

19 MR. HARVIS: It is, your Honor, but this is
20 discovery, not trial, so we are apparently given
21 more --

22 THE COURT: Even open investigations.

23 MR. HARVIS: Thank you, your Honor. Just
24 for clarification, I would like -- if your Honor is
25 inclined, I would like these determinations to be made

1 based on current summaries of these officers' history.
2 For all we know, there are major things that have
3 developed here that would allow us to make 404(b) and
4 pattern and practice allegations or at least --

5 THE COURT: Subsequent events?

6 MR. HARVIS: Subsequent events, yes, your
7 Honor. It depends on the facts, certainly, but to
8 suggest that we're not entitled to see current
9 summaries because they're per se inadmissible, I think
10 is unfair under the state of the law in the Second
11 Circuit. I think the showing is difficult.

12 THE COURT: So you want them to rerun the
13 summaries?

14 MR. HARVIS: Right. I don't think we should
15 have to rely on one set literally from two weeks after
16 the incident. I think it should be ones that are
17 current and then if they want to have an argument about
18 the thing, it's an argument for trial about whether or
19 not they're admissible. I will tell your Honor we know
20 that Officer Zheng, within a few months of this
21 incident, struck someone else with a vehicle. We
22 haven't seen it in any of the summaries we've been
23 provided with but there was another litigation where
24 they had to pay \$165,000 because he hit someone's knee
25 backing up the car, the police car.

1 THE COURT: By accident?

2 MR. HARVIS: Well, he says so.

3 THE COURT: Was it a suspect?

4 MR. HARVIS: No. He was going to apprehend
5 a suspect and he put the car in reverse and I guess
6 slammed into this guy. We have the accident report
7 from that case.

8 THE COURT: Did he take off and tail the
9 suspect?

10 MR. HARVIS: No, he stayed. He was with
11 other officers. He stayed but he put down in the
12 accident report injuries, zero, even though this person
13 had to have two knee surgeries. So we know that there
14 are other issues with driving regarding this officer
15 and we think we might be able to --

16 THE COURT: But that's not --

17 MR. HARVIS: It's not excessive force.

18 MR. BERGMAN: Your Honor, if there's a
19 negligence claim here, we'd ask that this case be
20 dismissed.

21 THE COURT: No. Backing into someone is
22 very different.

23 MR. HARVIS: Well, lying about it.

24 THE COURT: Lying about it is not.

25 MR. HARVIS: That's what I'm saying. We

1 don't know what (ui) so I don't have the current
2 summaries. It's really about the disclosure for us
3 because we just want to know what arguments we can
4 make.

5 THE COURT: Identify this incident and
6 that's in the mix. Find out -- there was a CCRB or an
7 IAB?

8 MR. HARVIS: I just know there was a
9 lawsuit. Presumably, someone -- there was a person who
10 was injured while he was on duty, so I would think
11 there would be --

12 THE COURT: It was a lawsuit?

13 MR. HARVIS: Oh, yeah. They settled it for
14 \$165,000.

15 THE COURT: In state court?

16 MR. HARVIS: State court.

17 THE COURT: Give him the date of the
18 incident. There may not be a CCRB or an IAB. If
19 there's not, there's no problem. If there is, raise it
20 with me.

21 MR. HARVIS: Okay.

22 THE COURT: But I don't want to recreate the
23 wheel. I think subsequent incidents are -- it's going
24 to be hard to get them in.

25 MR. HARVIS: Okay.

1 THE COURT: I'm just looking at the
2 requests.

3 MR. HARVIS: Of course.

4 THE COURT: That's the only exception, which
5 is the exception I mentioned to the ESI and the
6 disciplinary and personnel records. Everything else
7 will be produced. Defendants still have time for their
8 expert, so that's not a problem. A lot of stuff
9 they've asked for, how long is it going to take you to
10 get it? You're going to produce it before you do any
11 depositions because I don't want to hear, we need to do
12 additional depositions because we didn't have the
13 documents in time.

14 MR. BERGMAN: Yes, your Honor. Typically,
15 it takes us approximately thirty days to get those
16 sorts of documents. We put the requests in. In this
17 case --

18 THE COURT: Thirty days?

19 MR. BERGMAN: Your Honor, as I said, it's
20 typically that, or at least that's what we normally
21 contemplate. I can try to get them expedited but I
22 don't --

23 THE COURT: No, no. My hesitation was that
24 I don't think -- typically, I don't think you can get
25 it done in thirty days. If you go back to them and

1 say, give us X, Y and Z, we're lucky if it's thirty
2 days.

3 MR. BERGMAN: If your Honor would be
4 inclined to provide more time, then we would certainly
5 take that time.

6 THE COURT: 45 days. Then you take your
7 depositions. You've got four defendants or three
8 defendants, a driver, and the plaintiff, and that's it.

9 MR. BERGMAN: That's it.

10 THE COURT: You can get those done in a
11 couple of weeks.

12 MR. HARVIS: I just want to be clear, that's
13 it for everybody. There are no other depositions in
14 the case, correct? They can't tell us they want to
15 depose other people now.

16 THE COURT: That's all that was either asked
17 for prior to the close of discovery on March 19th or --
18 asked for and agreed to or -- I don't know how to
19 characterize the driver.

20 MR. HARVIS: Late disclosure.

21 THE COURT: Late disclosure.

22 MR. HARVIS: I just wanted to clarify that
23 it was a bilateral ruling and it wasn't just that
24 plaintiff --

25 THE COURT: Yeah.

1 MR. BERGMAN: If I may, I did recently
2 become aware of a series of releases that we need to
3 send plaintiff for medical documents. Will we be
4 permitted to request those documents under the
5 discovery schedule?

6 MR. HARVIS: May I be heard on that, your
7 Honor?

8 THE COURT: Not yet. What releases?

9 MR. BERGMAN: Your Honor, I believe we need
10 releases for medical imaging documents, with respect to
11 insurance companies, release to access MRI films
12 reviewed by Stanley Friedman, and then an OCA release
13 for no-fault records from Countrywide Insurance.

14 THE COURT: OCA release did you say?

15 MR. BERGMAN: I believe I just said a
16 release, your Honor.

17 THE COURT: Oh.

18 MR. BERGMAN: And for an individual named Ju
19 Lin (ph), who -- I'm not entirely sure what the nature
20 of his practice is but I was informed that we do need
21 access to I believe medical records.

22 MR. HARVIS: Your Honor, we basically gave
23 them this person's entire life history of medical
24 releases, literally every single provider that we could
25 even see anywhere in the records, which I'm pretty sure

1 includes these people, going back like fifteen years.
2 We've been beyond exhaustive. If those people were
3 left off, they will get them. We don't have any
4 objection. We want them to have the records. I just
5 want to say I'm pretty sure they already have them.
6 This is the first we're hearing about it, except for an
7 email on Friday.

8 THE COURT: So you think they already have
9 the releases.

10 MR. HARVIS: I know we sent them every
11 single thing, dozens of them.

12 THE COURT: And you don't have the releases.
13 You're saying you don't. You looked at the records.

14 MR. BERGMAN: I have to apologize. I'm not
15 entirely sure. I was informed that we don't but I
16 myself have not done a search.

17 THE COURT: Confirm that you do or you
18 don't. If you don't, have your client execute the
19 releases and get them within the next ten days.

20 MR. HARVIS: No problem. Can it be ten days
21 after they tell us whether they have them or not?

22 THE COURT: How soon can you tell them, end
23 of the week?

24 MR. BERGMAN: Yes, your Honor.

25 MR. HARVIS: That's fair.

1 THE COURT: So 45 days is -- I'll put
2 documents to be produced by June 15th. You'll have --
3 I'll give you a little more time, until July 13th to
4 complete the depositions, including any experts. If
5 you get the releases -- I'll give you until May 9th.

6 MR. HARVIS: Thank you, your Honor.

7 THE COURT: If you get those, hopefully
8 thirty days, June 9th, let's give you until June 15th.
9 You're going to want to get those records to your
10 expert before he examines Mr. Rodriguez?

11 MR. BERGMAN: I imagine so, your Honor, but
12 I also don't have the records.

13 THE COURT: Plaintiff to be examined by
14 defendants' expert by June 29th and the expert report --
15 when did I say discovery would close?

16 MR. HARVIS: The 13th, your Honor, I believe.

17 MS. FETT: May 18th, I believe.

18 MR. HARVIS: Now it's July 13th, I believe.

19 THE COURT: Fact discovery is to close July
20 13th. Defendants' expert report July 20th and I'll give
21 you two weeks, until August 3rd, to do the expert
22 depositions.

23 MR. HARVIS: Both Ms. Fett and I are going
24 to be out of town in that latter part of July, your
25 Honor. I'm just thinking ahead as a practical matter.

1 We then have trial beginning before Judge Hall.

2 THE COURT: Is it your practice to take
3 their expert depositions?

4 MR. HARVIS: Fair enough, probably not, but
5 it's more about them taking our expert's deposition.

6 THE COURT: They can take your expert's
7 deposition. They've got the report, right?

8 MR. HARVIS: Yes.

9 THE COURT: They can do it tomorrow.

10 MR. HARVIS: Yeah, I just wanted to mention
11 it so it's on everyone's radar that that's going to be
12 a tough couple of weeks for us and it's actually during
13 that time.

14 THE COURT: That's fine. You'll have until
15 August 3rd to complete the expert depositions. You can
16 do it before then if you want.

17 MR. HARVIS: Okay.

18 THE COURT: But that's the schedule, or you
19 could settle the case. It's up to you.

20 MR. HARVIS: Fair enough.

21 MR. BERGMAN: Thank you, your Honor.

22 THE COURT: Even though I've granted the
23 motion in part, I'm not assessing costs. Rule 37 says
24 it's mandatory unless there's a good reason why you
25 didn't produce the documents. Substantial

1 justification I think is the phrase, is that right?

2 MR. HARVIS: I think so, your Honor.

3 THE COURT: Close enough.

4 MR. HARVIS: Okay.

5 MR. BERGMAN: Thank you, your Honor.

6 THE COURT: Thank you.

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I certify that the foregoing is a correct
transcript from the electronic sound recording of the
proceedings in the above-entitled matter.



ELIZABETH BARRON

May 3, 2018